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No. 84-2009

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

DEL MONTE CORPORATION, A New York corporation,
R. J. REYNOLDS INDUSTRIES, INC., a Delaware corporation,
DEL MONTE SNACKS, INC., a California corporation,
Petitioners,

v.

BARBARA BLAU, RAM BLAU, ANN MAYO and
RICHARD LINDGREN, individually and
on behalf of all other former employees of
DEL MONTE SNACKS, INC., similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF ORGANIZATION RESOURCES COUNSELORS, INC. FOR LEAVE TO FILE BRIEF, AMICUS CURIAE, AND BRIEF OF ORGANIZATION RESOURCES COUNSELORS, INC. AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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MOTION OF ORGANIZATION RESOURCES COUNSELORS, INC. FOR LEAVE TO FILE BRIEF, AMICUS CURIAE

Organization Resources Counselors, Inc. (ORC) respectfully requests leave of the Court to file a brief as amicus curiae in the above-captioned action.[1] A copy of the brief is bound with this motion. As grounds for its motion, ORC states as follows:

1. The case at bar is an action by nonunion salaried employees of Granny Goose Foods, Inc. (Granny Goose) for "severance" benefits allegedly due as a consequence of

[1] Pursuant to Court Rule 36.1, ORC sought the consent of counsel for petitioners, Walter R. Allen, and counsel for respondents, John J. Vlahos, to the filing of the brief. Counsel for the petitioners consented; counsel for the respondents did not.

the sale of Granny Goose by Del Monte to independent investors, though these employees retained their same jobs at the same rates of pay without interruption.

2. ORC is a world-wide management consulting firm which specializes in employment relationships and the utilization of human resources. ORC provides consulting services to over 200 of the nation's major employers. These employers are representative of every major segment of American business and of all areas of the country. Representatives of those employers meet regularly with ORC to review current developments, to exchange information on current issues and concerns and to examine the effects of governmental and judicial initiatives. These employers have approximately 6.1 million employees and annual sales of approximately $1600 billion. They sponsor over 3600 employee benefit plans, each of their employees being a participant in several plans. ORC's continual and regular contact with this large number of major corporate organizations generates considerable data and provides ORC with insight into the problems and concerns of American businesses. The views of ORC as amicus curiae generally reflect those concerns.

3. The day-to-day administration of those 3600 employee benefit plans as well as other plans could be affected if the approach to the interpretation of employee benefit plans adopted by the court below were to prevail.

4. That court's approach to the interpretation of language in employee benefit plans would narrow plan administrators' scope of choice among alternate reasonable interpretations of plans; it would increase the number of benefit plan interpretation cases occupying judicial time, and it would increase uncertainty regarding participants' entitlement to benefits and employee benefit plan liabilities.

5. The greater uncertainty regarding the liabilities of employee benefit plans may impel sponsors to revise

their benefit plans to explicitly provide for each forseeable contingency. These revisions would involve considerable cost (which could better be spent for benefits), and would result in increasing the length and complexity of plan provisions thereby making it much more difficult to comply with the mandate of the Employee Retirement Income Security Act of 1974 (ERISA) to describe plans "in a manner calculated to be understood by the average plan participant". 29 U.S.C. § 1022(a)(1).

6. The greater uncertainty regarding the liabilities of employee benefit plans would also add to the complexity and difficulty of buying or selling a going business with employee benefit plans intact.

7. The lower court's approach also jeopardizes the integrity of the federal legislative process. Although Congress specified the sanctions that should be applied for noncompliance with the reporting and disclosure provisions of ERISA, the court below in effect created a new sanction for such noncompliance: liability for benefits which would not otherwise be available under the benefit plan.

WHEREFORE, ORC respectfully requests leave of the Court to file its brief as amicus curiae.

Respectfully submitted,

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BRIEF OF ORGANIZATION RESOURCES COUNSELORS, INC. AS AMICUS CURIAE IN SUPPORT OF THE PETITION

INTEREST OF AMICUS CURIAE

The interest of Organization Resources Counselors, Inc. (ORC) as amicus curiae is set forth in the motion for leave to file that accompanies this brief.

SUMMARY OF ARGUMENT

Under the Employee Retirement Income Security Act of 1974 (ERISA), the plan administrator's interpretation of "an employee benefit plan will not be reversed by the courts unless it is arbitrary, capricious, made in bad faith, not supported by substantial evidence, or erroneous on a question of law." *Malhiot v. Southern California Retail Clerks Union*, 735 F.2d 1133, 1135 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 959 (1985). A plan administrator's interpretation does not become arbitrary and capricious by reason of its noncompliance with the reporting and disclosure provisions of ERISA.

Congress has provided specific sanctions for noncompliance with the reporting and disclosure provisions of ERISA. The courts may not create additional sanctions. Even if there were some circumstances warranting a remedy beyond those specified in the Act, the remedy fashioned by the court below is not appropriate because it undercuts important national policies.

Furthermore, an early resolution of the issues is necessary to carry out the strongly expressed Congressional policy in favor of uniform national rules to govern employee benefit plans.

ARGUMENT

The court below held that noncompliance with the reporting and disclosure provisions of ERISA gives rise to a participant cause of action for severance benefits. The court so held even though the plaintiffs who had worked for Granny Goose Foods, Inc. (Granny Goose) continued without interruption to work for Granny Goose at their same jobs at the same rates of pay. The court so held even though there was no showing of any causal relationship between noncompliance with ERISA and the plan administrator's interpretation that plaintiffs were not entitled to benefits. The court so held even though

Congress specified with particularity the sanctions for noncompliance, and further specified with particularity who has standing to seek particular remedies. Employee benefit plans are designed to ameliorate certain economic risks faced by participants in those plans.[1] Forcing an employee benefit plan to pay out "windfall" benefits runs counter to that underlying principle.

A. The Petition Should Be Granted Because the Case at Bar Raises Critical Questions Affecting the Administration of Over 2.3 Million Employee Benefit Plans

The case at bar raises critical questions affecting the day-to-day administration of over 1.6 million employee welfare benefit plans covering over 140 million participants and beneficiaries and about 788,000 employee pension benefit plans covering about 64.5 million participants and beneficiaries.[2] At issue is whether the established respective roles of plan administrators and the courts in interpreting employee benefit plans should be modified or exceptions allowed. ORC estimates that, on the average, over six decisions per plan per year are subject to participant requests for a second review within the structure of the plan. Given the approximately 2.388 million employee benefit plans, that means that over 14 million plan administrators' decisions are subjected to a second review within the plan each year upon the request of the participant after the initial decision of the plan administrator. The number of initial decisions made by plan administrators is unknown, but it is many times the number of cases invoking plan review procedures. It is sound policy, therefore, and it is the policy underlying the prevailing law, for courts to defer

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[1] "The purpose of severance pay is to provide a cushion for terminated employees while they are seeking new employment." 1 Pol'y & Prac. Ser., Compensation (BNA) § 331 at 731.

[2] These estimates were obtained from the U.S. Department of Labor.

to plan administrators in the absence of a showing that a decision is arbitrary and capricious. Any other policy would lead to an unmanageable number of reviews by courts.

In the case at bar the interpretative question was whether an employee of Granny Goose is entitled to "severance" pay benefits when he or she continues to work for Granny Goose at the same job at the same rate of pay although Granny Goose is no longer within the Del Monte corporate structure. Del Monte has sold a number of subsidiary corporations, both before and since the initiation of this action, in transactions similar to the sale of Granny Goose. In none of these transactions have severance pay benefits been paid.[3] The plan's meaning, as elucidated by the way it was applied in all these transactions, clearly shows that benefits are payable only upon actual job loss resulting in economic harm.

Moreover, it is settled doctrine that where an employee benefit plan admits of two or more reasonable interpretations, the interpretation of the plan administrator should prevail. Even if one were reluctant to acknowledge the clarity of the Del Monte plan's meaning from its consistent application over a significant period of time, the job loss interpretation of the plan administrator is clearly a reasonable one in the context of this plan. Thus, its interpretation should prevail.

In the case at bar, however, the court below refused to consider the cogent, consistent practice of the plan administrator because the plan was not in compliance

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[3] ORC has made a sample survey of 22 of the largest companies in the nation which indicates (1) that all of those surveyed have severance pay plans, (2) that none of those plans pay severance benefits upon the sale of a subsidiary or business unit without job loss or significant economic harm to employees, and (3) that, until the case at bar, most of them did not have language in their plans specifically excluding coverage where the sale of a subsidiary or unit does not result in job loss or significant economic harm to employees.

with the reporting and disclosure provisions of ERISA. The fact that plaintiffs had actual knowledge of the existence of the plan made no difference to the court below. Having put aside the past consistent application of the plan as an aid in interpreting the plan, the court below turned to the language of the plan and found that the plan administrator's interpretation was "not required" by its language. *Blau v. Del Monte Corporation*, 748 F.2d 1348, 1354 (9th Cir. 1984).

Del Monte was not required to have a severance pay plan and, if it chose to have one, it was free to condition its severance pay policy so as to exclude such benefits where a subsidiary is sold as a unit and there has been no job loss. The question in the court below was whether reading the plan this way was a fair and reasonable interpretation of the plan language.[4] The Court of Appeals said that such a construction of the plan was beyond the range of reasonable discretion of the plan administrator. That conclusion was a gross abuse of judicial authority. But that is not all. The Court of Appeals also said that the standard approach of looking to past practice for elucidation of language was not permissible in this case because of unrelated procedural requirements of ERISA.[5]

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[4] In connection with a similar sale of a business unit and a similar interpretation of a similar severance pay policy, a recent court found that the employer "reached a logical conclusion when it determined that severance pay benefits for laid off employees were intended for employees who suffered at least some period of unemployment . . . [and] avoids the obvious windfall that the employees would otherwise receive." *Pabst Brewing Company v. Anger*, Civ. No. 3-84-461, slip op. (D.C. Minn. June 6, 1985).

[5] In *Gilbert v. Burlington Industries*, Nos. 84-7824, 84-7908, 84-7914, slip op. (2d Cir. June 17, 1985), the court appears to approve the approach of holding an otherwise reasonable interpretation of a benefit plan to be arbitrary because of violation of procedural requirements. The court relied upon the erroneous proposition that "ordinarily there is no remedy for the violation for [sic]

Congress did not intend denial of that time-honored aid to be a remedy for violation of ERISA's reporting and disclosure provisions.[6]

B. The Petition Should Be Granted Because It Raises Fundamental Questions Regarding The Propriety of Judicial Creation of a Remedy Where Congress Has Already Specified the Penalty for Noncompliance

Integrity of the legislative process is a matter of vital concern. Many compromises were struck in the course of the lengthy legislative process that led to the enactment of ERISA. Though the courts play a critical role in resolving certain issues arising under ERISA, it is no oversight that the Act does not authorize them to fashion whatever remedies they deem desirable for noncompliance with the procedural requirements. "Where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 19 (1979).

Congress carefully crafted ERISA during that long legislative process leading to its enactment. Many

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procedural requirements." *Id.* Civil remedies for violation of reporting and disclosure procedural requirements are discussed at p. 7, *infra*. The statutory provisions authorizing civil remedies for violation of procedural requirements and imposing criminal penalties for such violations are set out in the Appendix.

[6] The consequences could be far reaching. Creating an ill-defined class of cases in which reference to past practice is forbidden would introduce another discordant note into the realm of labor relations and would only increase tension and litigation. The administration of Title IV of ERISA by the Pension Benefit Guaranty Corporation (PBGC) might also be impacted. PBGC looks to past practice for guidance regarding the proper interpretation of plan language. If the Ninth Circuit's approach in *Blau* were to prevail, PBGC might be required to inquire whether there have been reporting and disclosure violations and to decide whether the noncompliance were sufficiently serious that PBGC could not look to the past practice of the plan for guidance in interpreting its provisions.

changes were made during its consideration by four committees of the Congress, during its consideration on the floor of the Senate and then in the House. Finally, it was rewritten in substantial part in the Conference Committee.

This Court is familiar with the crafting of ERISA remedies. Only a few weeks ago, this Court said "We are reluctant to 'fine-tune' an enforcement scheme crafted with such evident care as the one in ERISA." *Massachusetts Mutual Life Insurance Company v. Russell*, 53 U.S.L.W. 4938, 4942 (U.S. June 27, 1985). And even more apropos to the case at bar, this Court observed that the "carefully-integrated civil enforcement provisions found in . . . the statute [ERISA] as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies . . ." *Id.* (emphasis in original).

ERISA requires reporting of information to the Secretary of Labor and disclosure of certain information to participants, sometimes upon request. Congress specified sanctions for non-compliance with ERISA,[7] and who had standing to enforce those sanctions. The statutory remedies for noncompliance with the reporting and disclosure provisions of ERISA are set out in the Appendix to this brief.

ERISA authorizes either a participant or the Secretary of Labor to bring a civil action "to enjoin any act or practice which violates any provision" or to "obtain other appropriate equitable relief." 29 U.S.C. § 1132 (a)(5). Respondents could have brought an action to redress the noncompliance with the reporting and dis-

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[7] For example, Congress provided for criminal penalties for certain violations of reporting and disclosure provisions, but did not provide for any specific criminal penalties for the violation of prohibited transactions or other breaches of fiduciary obligations under ERISA. 29 U.S.C. § 1131.

closure requirements of ERISA. Instead they chose to bring the present action for benefits.[8]

Benefits of an employee benefit plan are payable from the plan, not from the plan sponsor.[9] ERISA specifically makes the plan subject to being sued as a separate entity. 29 U.S.C. § 1132(d)(1). "ERISA permits suits to recover benefits only against the Plan as an entity . . ." *Gelardi v. Pertec Computer Corporation*, 761 F.2d 1323, 1324 (9th Cir. 1985). In the instant case, the plan was unfunded, i.e., benefits were paid out of the general funds of the employer-sponsor. Most employee benefit plans, however, have funds of their own. It would not be a proper expenditure of these funds for a plan to pay for an employer-sponsor's non-compliance with ERISA. If the decision below stands, it could add confusion to an already complex area of law and could possibly be the basis for improper court orders against plans for the wrongs of others.

Although the erroneous award of severance benefits in a single case would not warrant the attention of this Court, severance benefit plans are prevalent across the nation. More importantly, the same erroneous reasoning of the court below would apply to other employee benefit plans. It is thus critical that this Court hear this case and resolve this important issue.

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[8] The counts in the complaint in the case at bar for damages were claims under state common law preempted by ERISA; therefore they were dismissed. *Blau v. Del Monte Corporation*, 748 F.2d at 1356-7.

[9] This point was not raised below, probably because in this case benefits were payable from the general funds of the employer. It made no practical difference, therefore, whether the order ran against the plan or against the employer-sponsor. In the context of employee benefit plans generally, this is a rare case in that respect.

C. The Petition Should be Granted Because the Conflict Among the Circuit Courts of Appeal is Jeopardizing the Congressional Policy that Employee Benefit Plan Law Should be Uniform Across the Nation

The existence of a conflict among the Circuit Courts of Appeal has been discussed in the Petition for Certiorari, and will not be repeated here. Congress made it clear that uniform national rules regarding employee benefit plans are of vital importance. The enactment of standards in ERISA demonstrates the Congressional view that nationwide rules were needed. But Congress did not stop there. Congress was so concerned about the uniformity of the legal rules governing employee benefit plans that it ousted state law with preemption language [10] that this Court has described as a "virtually unique preemption provision." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 at n.26 (1983).

Lack of national uniformity regarding the application of ERISA causes multi-state employers severe hardship. It also makes administration of employee benefit programs more difficult and expensive by creating uncertainty in benefit plan decisions, and it can lead to employee discontent. The decision below would result in totally unexpected liabilities for the employee benefit plan and a windfall for the employees involved. To the extent that costs of employee benefit plans become less predictable, employers will be more reluctant to establish and maintain them. Unlike the plan in the case at bar, the overwhelming majority of employee benefit plans are funded, and reasonable forseeability of liabilities is essential to their actuarial soundness. Lack of uniformity of rules and lack of reasonable predictability of costs

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[10] "This provision has been aptly termed the most sweeping federal preemption statute ever enacted by Congress." *California Hospital Association v. Henning*, 569 F. Supp. 1544, 1546 (C.D. Cal. 1983).

inhibits the expansion of employee benefit plans and detracts from their fair and efficient administration. Thus, early resolution of the issues at hand is as important as the merits of the resolution.

CONCLUSION

For the reasons set forth above, amicus curiae respectfully submits that the issues raised by the decision below are of substantial significance warranting this Court's review, and therefore the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: July 26, 1985

APPENDIX

REMEDIES FOR VIOLATION OF THE REPORTING AND DISCLOSURE REQUIREMENTS OF ERISA

18 U.S.C. § 1027. False statements and concealment of facts in relation to documents required by the Employee Retirement Income Security Act of 1974.

> Whoever, in any document required by title I of the Employee Retirement Income Security Act of 1974 (as amended from time to time) to be published, or kept as part of the records of any employee welfare benefit plan or employee pension benefit plan, or certified to the administrator of any such plan, makes any false statement or representation of fact, knowing it to be false, or knowingly conceals, covers up, or fails to disclose any fact the disclosure of which is required by such title or is necessary to verify, explain, clarify or check for accuracy and completeness any report required by such title to be published or any information required by such title to be certified, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

26 U.S.C. § 6652. Failure to file certain information returns, registration statements, etc.

> (e) Annual registration and other notification by pension plan.—
>
> (1) Registration.—In the case of any failure to file a registration statement required under section 6057(a) (relating to annual registration of certain plans) which includes all participants required to be included in such statement, on the date prescribed therefor (determined without regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause, there shall be paid (on notice and demand by the Secretary and in the same manner as tax) by the person failing so to file,

an amount equal to $1 for each participant with respect to whom there is a failure to file, multiplied by the number of days during which such failure continues, but the total amount imposed under this paragraph on any person for any failure to file with respect to any plan year shall not exceed $5,000.

(2) Notification of change of status.—In the case of failure to file a notification required under section 6057(b) (relating to notification of change of status) on the date prescribed therefor (determined without regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause, there shall be paid (on notice and demand by the Secretary and in the same manner as tax) by the person failing so to file, $1 for each day during which such failure continues, but the total amounts imposed under this paragraph on any person for failure to file any notification shall not exceed $1,000.

(f) Information required in connection with certain plans of deferred compensation.—

In the case of failure to file a return or statement required under section 6058 (relating to information required in connection with certain plans of deferred compensation), 6047 (relating to information relating to certain trusts and annuity and bond purchase plans), or 6039D (relating to returns and records with respect to certain fringe benefit plans) on the date and in the manner prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause, there shall be paid (on notice and demand by the Secretary and in the same manner as tax) by the person failing so to file, $25 for each day during which such failure continues, but the total amount imposed under this subsection on any person for failure to file any return shall not exceed $15,000.

29 U.S.C. § 1025. Reporting of participant's benefit rights.

(c) Individual statement furnished by administrator to participants setting forth information in administrator's Internal Revenue registration statement.

Each administrator required to register under section 6057 of Title 26 shall, before the expiration of the time prescribed for such registration, furnish to each participant described in subsection (a) (2) (C) of such section, an individual statement setting forth the information with respect to such participant required to be contained in the registration statement required by section 6057(a) (2) of Title 26. Such statement shall also include a notice to the participant of any benefits which are forfeitable if the participant dies before a certain date.

29 U.S.C. § 1131. Criminal Penalties.

Any person who willfully violates any provision of part 1 of this subtitle, or any regulation or order issued under any such provision, shall upon conviction be fined not more than $5,000 or imprisoned not more than one year, or both; except that in the case of such violation by a person not an individual, the fine imposed upon such person shall be a fine not exceeding $100,000.

29 U.S.C. § 1132. Civil enforcement.

Persons empowered to bring civil action

(a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section,

* * * *

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

* * * * *

Administrator's refusal to supply requested information

(c) Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.